Public Prosecutor v Letchumanan a/l Suppiah

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO W–05–26 OF 2000

ABDUL KADIR SULAIMAN, ARIFIN ZAKARIA AND NIK HASHIM JJCA

21 DECEMBER 2005

Criminal Law — Dangerous Drugs Act 1952 — s 37(d) — Drugs found in plastic packet in motorcycle carrier basket — Judge identifying motorcycle as the object for the purposes of s 37(d) — Whether the object ought to have been the plastic bag in the carrier basket instead

Criminal Law — Dangerous Drugs Act 1952 — s 37(d) — Drugs found in plastic packet in motorcycle carrier basket — Whether issue of motorcycle ownership relevant — Whether relevant issue instead custody and control of the plastic packet in the carrier basket

Criminal Law — Dangerous Drugs Act 1952 — ss 39B(1)(a), 39B(2) — Trafficking in dangerous drugs — Whether possession of the dangerous drugs affirmatively established or ought to be presumed — Whether trafficking affirmatively established – Whether charge ought to be reduced to one of possession under ss 12(2) read with 39A(2) of the Act

Acting on prior information received, a police party led by PW5 set up ambush and arrested the appellant riding motorcycle WDU 4259 ('the motorcycle'). On arresting the respondent, PW5 recovered an orange plastic packet from the carrier basket of the motorcycle. The orange packet was found to contain further packets containing a granular substance, confirmed later to be dangerous drugs. The respondent was thus charged in the High Court with an offence under s 39B(1)(a) punishable under s 39B(2) of the Dangerous Drugs Act 1952 ('the Act'). At trial, the High Court judge found that the motorcycle did not belong to the respondent but to his brother. The judge held that a motorcycle was not capable of coming within the ambit of the words 'anything whatsoever containing any dangerous drugs' under s 37(d) of the Act. The judge also held that the presumption under s 37(h) of the Act did not apply since the drugs were not found concealed in a specially constructed compartment of the motorcycle. The judge further opined that the evidence of the respondent's brother was material to the unfolding of the prosecution's case and the failure to call him was fatal to the prosecution's case pursuant to s 114 illustration (g) of the Evidence Act 1950. The judge therefore acquitted and discharged the respondent without calling for his defence at the close of the prosecution's case. The deputy public prosecutor appealed.

Held, setting aside the order of acquittal and discharge and ordering the respondent to enter defence on an amended charge under s 12(2) read with s 39A(2) of the Act:

(1) The judge had misdirected himself by choosing the wrong object for the purpose of s 37(d) of the Act. It mattered not as to whom the motorcycle belonged but what mattered for the purpose of the statutory presumption to apply was the orange plastic packet. The relevant question to ask was whether the plastic packet at the material time was in the custody or under the control of the accused (see para 8).

(2) In the instant case, the orange plastic packet was in the carrier basket of the motorcycle right in front of the respondent placed between the handle of the vehicle and between his legs when he was riding it. It was seen by PW5 from a distance of about six to seven feet away when he was observing the respondent. It was thus beyond dispute that the respondent must have known of the existence of the plastic packet and therefore, must have had in his custody or under his control the orange plastic packet which subsequently was established to contain the dangerous drugs. From the facts, the statutory presumption under s 37(d) of the Act would operate against the respondent (see para 10).

(3) The issue of the ownership of the motorcycle was irrelevant. The issue was one of custody or control of the orange plastic packet in the carrier basket of the motorcycle. Without calling the respondent's brother, the prosecution was able to discharge the burden of establishing possession with knowledge with the aid of the presumption under s 37(d) of the Act. The ownership of the drugs was never in issue (see para 15).

(4) The statutory presumption disposed of the issue of possession with knowledge. There was no affirmative finding by the judge that the accused had the requisite knowledge of the drugs in the orange packet in the carrier basket. Thus the statutory presumption of trafficking could not come into operation to presume trafficking by the accused. In the absence of evidence of trafficking in the drugs, what was left was the evidence of being in possession of the same with the requisite knowledge pursuant to s 37(d) of the Act. Thus at the close of the prosecution's case, the judge ought to have called upon the respondent to enter his defence upon an amended charge under s 12(2) and punishable under s 39A(2) of the Act, the dangerous drugs in question being of more than 5g in weight (see para 17).

[Bahasa Malaysia summary

Bertindak berdasarkan maklumat yang telah diterima sebelumnya, sepasukan polis diketuai oleh PW5 telah mengepong dan menangkap perayu menunggang motorsikal WDU 42589 ('motorsikal tersebut'). Setelah menangkap responden, PW5 telah menemui paket plastik jingga daripada bakul depan motorsikal. Paket jingga itu didapati mengandungi paket-paket yang mengandungi bahan yang berbutir, disahkan kemudiannya sebagai dadah berbahaya. Responden oleh itu telah dituduh di Mahkamah Tinggi kerana kesalahan di bawah s 39B(1)(a) yang membawa hukuman di bawah s 39B(2) Akta Dadah Berbahaya 1952 ('Akta tersebut'). Semasa perbicaraan, hakim Mahkamah Tinggi mendapati bahawa motorsikal tersebut bukan milik responden tetapi abangnya. Hakim memutuskan bahawa sebuah motorsikal tidak boleh dianggap terangkum dalam skop perkataan-perkataan 'anything

whatsoever containing any dangerous drugs' di bawah s 37(d) Akta tersebut. Hakim juga memutuskan bahawa anggapan di bawah s 37(h) Akta tersebut tidak terpakai memandangkan dadah tersebut tidak ditemui tersorok dalam bahagian khusus motorsikal tersebut. Hakim berpendapat lagi bahawa keterangan abang responden adalah material dalam mengukuhkan kes pihak pendakwa dan kegagalan untuk memanggil beliau akan menjejaskan kes pihak pendakwa menurut s 114 ilustrasi (g) Akta Keterangan 1950. Hakim dengan itu telah melepas dan membebaskan responden tanpa memanggil pembelaannya di penutup kes pihak pendakwa. Timbalan pendakwa raya telah merayu.]

Diputuskan, mengenepikan perintah pelepasan dan pembebasan tersebut dan memerintahkan responden memasukkan pembelaan atas pertuduhan pindaan di bawah s 12(2) dibaca bersama s 39A(2) Akta tersebut:

(1) Hakim telah salah arah dengan memilih objek yang salah bagi tujuan s 37(d) Akta tersebut. Ia tidak penting jika motorsikal tersebut milik siapa tetapi apa yang penting bagi tujuan andaian statutori untuk digunakan adalah paket plastik jingga itu. Persoalan relevan untuk ditanya adalah sama ada paket plastik tersebut pada masa matan dalam jagaan atau di bawah kawalan tertuduh (lihat perenggan 8).

(2) Dalam kes semasa, paket plastik jingga tersebut berada dalam bakul depan motorsikal di hadapan responden yang terletak di antara pemegang kenderaan dan antara kakinya apabila beliau menunggangnya. Ia dapat dilihat dari jauh oleh PW5 iaitu kira-kira enam hingga tujuh kaki apabila beliau memerhatikan responden. Ia tidak boleh dipertikaikan bahawa responden pastinya mengetahui tentang kewujudan paket plastik tersebut dan oleh itu, mempunyai dalam jagaan atau di bawah kawalannya paket plastik jingga tersebut yang kemudiannya telah dikenalpasti sebagai dadah berbahaya. Berdasarkan fakta-fakta, andaian statutori di bawah s 37(d) Akta tersebut bertindak sebaliknya terhadap responden (lihat perenggan 10).

(3) Persoalan ketuanpunyaan motorsikal tersebut adalah tidak relevan. Persoalannya adalah berkaitan jagaan atau kawalan paket plastik jingga tersebut dalam bakul motorsikal tersebut. Tanpa memanggil abang responden, pihak pendakwa berjaya melepaskan beban membuktikan milikan dengan pengetahuan dibantu oleh andaian di bawah s 37(d) Akta tersebut. Ketuanpunyaan dadah tersebut tidak pernah menjadi isu (lihat perenggan 15).

(4) Andaian statutori menentukan persoalan milikan dengan pengetahuan. Tiada penemuan yang mengiakan oleh hakim bahawa tertuduh mempunyai pengetahuan tentang dadah dalam paket plastik jingga dalam bakul motorsikal tersebut. Oleh itu andaian statutori pengedaran tidak beroperasi untuk menganggap pengedaran oleh tertuduh. Dalam ketiadaan keterangan pengedaran dadah, apa yang tinggal adalah keterangan berhubung milikan dadah dengan pengetahuan menurut s 37(d) Akta tersebut. Oleh itu di penutup kes pihak pendakwa, hakim sepatutnya memanggil responden untuk memasuki pembelaannya berdasarkan pertuduhan pindaan di bawah s 12(2) dan boleh dihukum di bawah s 39A(2) Akta tersebut, berdasarkan dadah berbahaya yang dipersoalkan itu melebihi berat 5g (lihat perenggan 17).

Notes

For cases on s 37(d) of the Dangerous Drugs Act 1952, see *Mallal's Digest* (4th Ed, Reissue) paras 163–168.

For cases on ss 39B(1)(a), 39B(2) of the Dangerous Drugs Act 1952, see *Mallal's Digest* (4th Ed, Reissue) paras 290–391, 448–453.

Cases referred to

Muhammed bin Hassan v PP [1998] 2 MLJ 273
PP v Lin Lian Chen [1992] 2 MLJ 561
Tong Peng Hong v PP [1955] MLJ 232

Legislation referred to

Dangerous Drugs Act 1952 ss 12(2), 37(d), 39A(2), 39B(1)(a)
Dangerous Drugs Ordinance 1952 ss 6, 37(d)

Manoj Kurup (Attorney General's Chambers) for the appellants.
M Visvanathan (Saibullah MV Nathan & Co) for the respondents.

Abdul Kadir Sulaiman JCA (delivering judgment of the court):

[1] This was an appeal by the public prosecutor over the decision of the learned judge given on 17 April 2000 acquitting and discharging the respondent at the end of the prosecution's case without calling for his defence on a charge under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act'), on the ground that the prosecution had failed to make out a prima facie case against the respondent. We heard the appeal on 9 May 2005 and at the end of it we allowed the appeal. We set aside the order of acquittal and discharge made by the learned judge and ordered the respondent to enter his defence on an amended charge under s 12(2) and punishable under s 39A(2) of the Act. We now provide our reasons for the order.

[2] For convenience, in this judgment, we would refer to the respondent as the accused. Before the learned judge, the accused was charged on an amended charge which reads as follows:

> Bahawa kamu pada 26 November 1997, jam lebih kurang 6.30 petang dihadapan kedai No 1, Jalan Pelangi 1, Taman Pelangi Jaya, Sentul, Kuala Lumpur, di dalam Wilayah Persekutuan, telah mengedar dadah berbahaya iaitu 2 paket plastik yang mengandungi 56.2g campuran heroin dan monoacetylmorphines (17.4g heroin dan 38.8g monoacetylmorphines) dan oleh yang demikian itu kamu telah melakukan satu kesalahan di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah s 39B(2) Akta yang sama.

[3] According to the evidence, based on information received, on 26 November 1997 at about 6pm, a police party led by PW5 laid an ambush at a spot in the shopping area at Taman Pelangi Jaya Satu, Sentul, Kuala Lumpur. They were waiting for a male Indian using motorcycle No WDU4259 for suspecting to be trafficking in dangerous drug, heroin. About 30 minutes later, from a distance of about six to seven feet away, PW5 saw the motor cycle ridden by a male Indian passing by the area

and making a U-turn and then stopped his motor cycle with its engine still running. The rider was alone. While on the motor cycle, the witness observed that this male Indian was turning his face left and right as if looking for someone. From where he was, PW5 could see one orange plastic packet inside the carrier basket situated in front of the motorcycle. He then instructed one of his team men to effect an arrest on this male Indian. The latter pounced upon him after identifying himself as a police officer and told the suspect not to escape, because according to the witness, this man was then struggling with the officer and was trying to make an escape. The witness then approached the male Indian and after identifying himself, told him not to fight back. The motorcycle fell to the ground. The man was accordingly arrested. PW5 then went to recover the orange plastic packet from inside the carrier basket. He opened up the packet in front of the suspect and other members of his team. He found inside the packet, two other plastic packets wrapped with a Tamil newspaper of 14 November 1997. Inside the two plastic packets, he saw pink powdery and small granular substances which he suspected to be heroin. These substances were later confirmed by the chemist to be that of 17.4g of heroin and 38.8g of monoacetylmorphines, the quantities stated in the charge.

[4] The investigation into this case revealed that the motorcycle which the accused was riding did not belong to him but to his brother, Ganesan a/l Suppiah, who was not called as a witness. On the issue of the ownership of the motorcycle, this is what the learned judge said:

> In considering whether the prosecution had made out a prima facie case against the accused a matter of prime consideration is the fact that he was not the owner of the motorcycle. It had been sold by PW4 to one Ganesan a/l Suppiah in September 1997. However, the accused was riding the motor cycle at the material time with the dangerous drugs in the carrier. Thus even though the motorcycle did not belong to the accused it was in his custody or control at the material time. That raises the question of whether proof of custody or control of the motorcycle is sufficient to activate the presumption contained in s 37(d) of the Act to show that the accused was in possession of the dangerous drugs.

[5] From there the learned judge went on to analyse whether a vehicle, which would include a motorcycle, is capable of coming within the ambit of the words 'anything whatsoever containing any dangerous drug' in s 37(d) of the Act, in order to assist the court, until the contrary is proved, to presume that the accused was in possession of, and knew the nature of such drugs. Citing excerpts from various case authorities, such as *Tong Peng Hong v Public Prosecutor* [1955] MLJ 232 and *Public Prosecutor v Lin Lian Chen* [1992] 2 MLJ 561, the learned judge concluded as follows:

> It is therefore my view that a motorcycle does not come within the meaning of the words 'anything whatsoever containing' in s 37(d) of the Act. The presumption contained in the subsection therefore does not arise. The presumption contained in s 37(h) of the Act also does not arise as the dangerous drugs were not found concealed in a specially constructed compartment of the motorcycle.

[6] Pausing there for a moment, *Tong Peng Hong* involves a case of a motor lorry. According to the report, the seat in the cab of the lorry consists of a sort of wooden

box divided into two compartments the top of which has a hinged lid upon which the occupants sit. At the time the lorry was stopped the driver and the accused were in the cab sitting on top of the said box. In the box, which was not locked, in the compartment immediately under where the accused was sitting was found a small leather bag of the type generally described as a grip which was closed with what is generally called a zip fastener but not locked. In this bag, under some pieces of worn-out personal clothing, were found four slabs of raw opium which form the subject matter of the charge before the sessions court against the accused under s 6 of the then Dangerous Drugs Ordinance 1952. The Ordinance contained a presumption section, which was in similar phraseology as the present s 37(d) of the Act. The learned President in that case was of the opinion that the words 'anything whatsoever' in the presumption section included the motor lorry. He went on to hold that on that basis the statutory presumption arose against the accused and called upon the accused to make his defence. After hearing the defence, he found that the accused had failed to rebut the presumption and he accordingly convicted him. The accused appealed against the said decision to the High Court. His appeal was allowed wherein his conviction was set aside and an order of acquittal and discharge was accordingly entered. Thomson J after commenting on the true construction of s 37(d) of the Ordinance went on to say at p 233:

> Applying these observations to s 37(d) of the Drugs Ordinance, it seems to me that if the words 'anything whatsoever' are to be construed literally they may well produce extremely unreasonable results. If something be found, for example, in a bag which I am carrying or in a box to which I hold the key it is extremely reasonable to suppose, unless I produce some satisfactory evidence to the contrary, that I know all about it. But how far is this to go? The learned President had taken it to the extent of saying that where something is found in a handbag which is being carried on a lorry, the owner of which is on it but not driving it, then the owner is to be presumed to know all about the contents of the handbag not because he is in control of the bag but because he is the person having the lorry in his custody or under his control for the time being. But if this be so, what is the position where something is found in a bag which is found in a railway train? Or in the 'Canton' in the Penang roads? Is it to be held, in the absence of proof to the contrary, that the engine driver or the guard of the train or the master of the ship has knowledge of the contents of the bag?
>
> In such cases it seems to me that the presumption does not apply. If there is an available construction which would avoid such unreasonable results it is to be adopted. If there is no such construction available then the court would be justified in holding that the rebuttal of the presumption lay in the very facts relied upon to set it up.
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> In the present case, however, it is a matter of construction for the true construction is clearly narrower and more reasonable than that adopted by the learned President.

[7] The above dicta was then followed by what was cited by the learned Judge in the present case under appeal before us, to justify the reason for deciding that a motorcycle is not capable of coming within the ambit of the words 'anything whatsoever containing any dangerous drugs' in the presumption subsection provided by s 37(d) of the Act. However, Thomson J went on in the following paragraph immediately after the paragraph cited by the learned judge to say:

> Applying that consideration to the present case the thing which contained the opium was not the lorry but the handbag to which, of course, by itself the statutory presumption had no application.

[8] Like *Tong Peng Hong*, the thing which contained the drugs, the subject matter of the charge in the present appeal, was not the motorcycle but the orange plastic packet. But unlike *Tong Peng Hong*, the statutory presumption would apply here because the position wherein the packet was placed, would infer custody and control of it in the accused. This is where in our view, the learned judge had misdirected himself by choosing the wrong object for the purpose of s 37(d) of the Act. It matters not as to whom the motorcycle belong but what matters for the purpose of the statutory presumption to apply is the orange plastic packet. The relevant question to ask is whether the plastic packet at the material time was in the custody or under the control of the accused? If it was so, then the presumption of being in possession of such drugs with the knowledge of the nature of the drugs was in the accused, until the contrary is proved. Having failed to rebut the presumption at the end of the prosecution case, the defence of the accused ought to be called.

[9] Section 37(d) of the Act states as follows:

> Any person who is found to have had in his custody or under his control anything whatsoever containing any dangerous drug shall, until the contrary is proved, be deemed to have been in possession of such drug and shall, until the contrary is proved, be deemed to have known the nature of such drug.

[10] The facts revealed that at the material time, the orange plastic packet was in the carrier basket of the motorcycle right in front of the accused placed between the handle of the vehicle and between his legs when he was riding it. Further it could even be seen by PW5 from a distance of about six to seven feet away when he was doing the observation at the shopping area. So, it is beyond dispute that the accused must have known of the existence of the plastic packet and therefore, must have had in his custody or under his control this orange plastic packet which subsequently was established to contain the dangerous drugs. From the facts, the statutory presumption under s 37(d) of the Act would operate against the accused, which until the contrary is proved, be deemed to have been in possession of such drugs and shall, until the contrary is proved, be deemed to have known that they are heroin and monoacetylmorphines, the subject matter of the charge.

[11] In further support of his erroneous view, the learned judge cited *Lin Lian Chen* and quoted the dictum of Edgar Joseph Jr SCJ at p 567 which agreed with the proposition of law enunciated by Thomson J in *Tong Peng Hong*. In the light of what had been said earlier, the issue before the learned judge for the purpose of the statutory presumption is not the motor cycle as a vehicle but of the orange plastic packet placed in front of the accused in the carrier basket. Reading the report in *Lin Lian Chen*, the facts are almost similar to the present case before us now in that the plastic bag which contained the dangerous drug was in a vehicle belonging to someone else with the accused alone in the car driving it. There it was held that in that situation, the statutory presumption could not be activated. But, the distinguishing feature of that case with the present one is the introduction of the exculpatory cautioned statement of the accused during the prosecution stage itself which would provide proof to the contrary. At the close of the case for the prosecution, counsel for the accused there submitted that there was no case to answer based on the ground, inter alia, that there was insufficient evidence of custody,

control or possession of the drugs, the subject matter of the charge, to which submission, the learned judge agreed and subsequently confirmed by the Supreme Court. The learned judge in that case has this to say to support his basis for saying that the accused has no case to answer:

> These facts disclosed in the course of the prosecution case tended to show that the accused's explanation in his cautioned statement as to the circumstances whereby he came to be driving the car could probably or reasonably be true.

[12] However, in our present case, there was no such exculpatory cautioned statement made by the accused tendered either by the prosecution or the defence which would explain the presence of the dangerous drugs in the carrier basket of the motorcycle ridden by the accused. Without this piece of exculpatory evidence, the surrounding circumstances lead to one and only inference that the accused must have been in custody or control of the orange plastic packet. That being the position, the statutory presumption under s 37(d) of the Act ought to be invoked. If that was done, until the contrary is proved, the accused shall be deemed to have been in possession of such drugs and until the contrary is proved, the accused shall be deemed to have known the nature of such drugs. But having misdirected himself on the issue, the learned judge had erroneously found no prima facie case been made out against the accused.

[13] Another reason for the finding of no prima facie case made out by the prosecution against the accused, was the application of the adverse inference against the prosecution by the learned judge for so-called failure to call a material witness to unfold the narrative upon which the prosecution case was based. This is what the learned judge said, again on a wrong premise in the light of what we have said earlier:

> However, it is possible for an inference of possession to be made if there had been evidence to show that the accused had the use of the motorcycle for quite a while. That will eliminate the probability that he took it from its owner, Ganeson a/l Suppiah, with the packet containing the dangerous drugs in the carrier. If such a probability had been eliminated by the prsecution by calling Ganeson a/l Suppiah as a witness then it can be inferred that the accused was in custody of the dangerous drugs. The further evidence of the conduct of the accused in resisting arrest and attempting to run away in such circumstances would lead to the inference that he had knowledge of the dangerous drugs. In that event the prosecution would have proved that the accused was in possession of the dangerous drugs. However, in the absence of Ganeson a/l Suppiah being called as a witness the prosecution is only left with the evidence of conduct of the accused.

[14] Then the learned judge went on to say:

> The prosecution could have relied on the conduct of the accused to establish his guilt if it has called Ganeson a/l Suppiah to testify that the motorcycle had been with the accused for quite a while and that the dangerous drugs recovered are not his. The evidence of Ganeson a/l Suppiah is therefore material to unfold the narrative upon which the prosecution case is based. As he is a material witness he ought to have been called to testify and the failure to do so is fatal to the prosecution case on the application of s 114(g) of the Evidence Act 1950.

[15] With due respect to the learned judge, in the light of what we have said earlier, this issue of the ownership of the motorcycle is an irrelevant one. The issue is one of custody or control of the orange plastic packet in the carrier basket of the motorcycle which in the circumstances of this case would not involve the ownership of the motorcycle on which the accused was riding wherein in the carrier basket within sight of the accused and the police party was found 'anything whatsoever containing any dangerous drug'. If the defence had been called, the accused might be able to explain away the presence of the plastic packet in the basket in front of him. But that is a different matter altogether. In any event, the name Ganeson a/l Suppiah never came out in the evidence of the prosecution in any culpable manner. The case against the accused was based on the observation made by PW5 and his team prior to the arrest and the accused's conduct which clearly showed that the accused was in custody or control of the orange packet in the carrier basket of the motorcycle. There was not even a suggestion by the defence that someone else had placed the drugs in the carrier basket. On the other hand, the totality of the evidence led by the prosecution including the cross examination of the witnesses by the defence never showed the culpability of anyone other than the accused in the matter. In our view, without calling Ganeson a/l Suppiah, the prosecution was able to discharge the burden of establishing possession with knowledge of the drugs in the accused with the aid of the presumption under s 37(d) of the Act. The ownership of the drugs was never in issue. Custody or control of them would suffice to constitute an essential step in the direction for a charge under s 39B of the Act.

[16] With the aid of the statutory presumption, it disposes the issue of possession with knowledge of the nature of the drugs in the accused, until the contrary is proved. But the charge against the accused is for trafficking in such drugs. The learned deputy submitted that accused's defence must be called on the original charge of trafficking as there was an express finding of knowledge on the part of the accused of the drugs. He based his argument on the finding of the learned judge as follows:

> However, in the absence of Ganeson a/l Suppiah being called as a witness the prosecution is only left with the evidence of conduct of the accused.... In *Chan Kwok Keung & Anor v. The Queen* [1990] 1 CLJ 411, it was held that for the flight of an accused to be capable of amounting to an admission of guilt there must be a nexus between the conduct of the accused, his flight and the offence in question. Mere absconding is not such vital circumstance which can be considered to show that the absconder was having any guilty mind (see *Bhagat Bahadur v. State* (1996) Cri LJ 2201). On the fact of this case there is no nexus between the conduct of the accused and the offence with which he had been charged. In the circumstances, the conduct of the accused can only show that he had knowledge of the dangerous drugs in the motorcycle.

[17] However, having said that the learned judge qualified it by citing the case of *Lin Lian Chen* where it was said that mere knowledge of the presence of packages in a motor vehicle without more would not be sufficient to constitute custody or control thereof though it would constitute an essential step in that direction. In the light of that, it is not correct to say that there was an affirmative finding made by the learned judge that the accused had the requisite knowledge of the drugs found in the orange plastic packet placed in the carrier basket of the motorcycle. With no such affirmative

finding, the statutory presumption provided by s 37(da) of the Act would not come into operation to presume trafficking in the drugs by the accused (see *Muhammed bin Hassan v Public Prosecutor* [1998] 2 MLJ 273). In the absence of evidence of trafficking in the drugs, what is left is the evidence of being in possession of the same with the requisite knowledge through the aid of the statutory presumption provided by s 37(d) of the Act. So, at the close of the case, the learned judge ought to have called upon the accused to enter his defence upon an amended charge for an offence under s 12(2) and punishable under s 39A(2) of the Act, the dangerous drugs in question being of more than 5g in weight.

[18] For the reasons given, we allowed the appeal of the appellant by setting aside the acquittal and discharge order of the learned judge. In its place, we made an order that the accused's defence be called and heard by the learned judge on an amended charge of being in possession of 56.2g of the mixture of heroin and monoacetylmorphines (17.4g of heroin and 38.8g of monoacetylmorphines), an offence under s 12(2) and punishable under s 39A(2) of the Act. In the meanwhile, we ordered the accused to be remanded in custody.

Order of acquittal and discharge set aside. Respondent orderd to enter defence on amended charge.

Reported by John Paul Simon